Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-317-91
ABDUL HAMID OMAR LP, PEH SWEE CHIN AND MOHAMED DZAIDDIN SCJJ
29 JULY 1993

Contract *— Settlement — Terms of contract contained in two letters — Interpretation — Intention of parties — Incorporation by reference*

Contract *— Settlement — Joint promise — Whether terms of settlement released all joint promisors — Contracts Act 1950 s 45*

Civil Procedure *— Striking out — Statement of claim — Inherent jurisdiction of the High Court in preventing abuses of its process — Rules of the High Court O 18 r 19*

The defendants were beneficial owners of shares in a company, Britama, which is a holding company of two wholly-owned subsidiaries, one of which was called Prime Co. The defendants sold their respective shares or shareholdings in Britama to the plaintiff company in consideration of allotment to the defendants, of shares in the plaintiff company credited as fully paid up. Under the sale agreement, the defendants undertook, jointly and severally, to pay the plaintiff company sums of money by which certain specified sums of money set out in the sale agreement and represented to the plaintiff company as correct, were less. These specified sums referred firstly, to the amount of the combined operating profits of Britama and Prime Co and secondly, to the amount of the total value of the assets of Britama and Prime Co and all their subsidiaries.

The plaintiff company brought an action to recover certain sums alleged to be shortfalls in relation to the operating profits and total assets. After the writ was filed, attempts were made to settle the matter by the seventh defendant and a subsidiary of the plaintiff company and in 1990, a letter by the seventh defendant to the plaintiff's subsidiary company was sent confirming the settlement. This letter referred to another letter sent by the plaintiff company to the seventh defendant in 1989 containing the proposals for settlement. The settlement offered by the 1990 letter was accepted and was carried out with the sum duly received. After the sum was paid, four of the defendants, relying on the settlement, applied by summons to strike out the plaintiff company's statement of claim. The plaintiff company opposed the application and relied on the 1989 letter, stating that the 1990 settlement could not operate as a release of the four defendants from the plaintiff company's claim in the civil suit.

The application of the defendants succeeded before the registrar but this decision was reversed by the learned judge in the High Court. The defendants have appealed.

Held, allowing the appeal:

(1) The sole function of the court is to construe the documents with a view to finding the intention of the parties. The function is in reality to find the meaning of the words, for such meaning is equivalent to such intention of the parties for the purpose of interpretation. The words in the 1990 letter about withdrawing the civil suit concerned should be accorded the meaning they clearly convey unless there were strong reasons to disregard them.

(2) The letter of 1990 had offered a settlement for all the defendants (including the present appellants) and not just the seventh defendant, in the civil suit which was required to be withdrawn. The meaning of the words was a release of all the defendants in the civil suit and not just the seventh defendant or any particular defendant. Therefore, s 45 of the Contracts Act 1950 cannot be relied on to argue that the release of a joint promisor does not discharge any other joint promisor.

(3) The High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 of the Rules of the High Court 1980 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

[Bahasa Malaysia summary

Defendan adalah pemilik benefisial saham-saham di dalam sebuah syarikat, Britama, iaitu syarikat induk dua subsidiari yang dipunyai sepenuhnya, satu daripadanya adalah Prime Co. Defendan telah menjual saham-saham mereka kepada plaintif dengan balasan berbentuk saham di dalam syarikat plaintif yang dikreditkan kepada defendan sebagai saham yang telah dibayar sepenuhnya. Di bawah perjanjian penjualan itu, defendan berakujanji, bersesama dan berasingan, untuk membayar kepada syarikat plaintif, sejumlah wang untuk menokok kekurangan antara jumlah wang yang disebut di dalam perjanjian penjualan itu dan yang diakui kepada syarikat plaintif sebagai betul dan jumlah yang sebetulnya. Jumlah wang yang disebutkan di dalam perjanjian penjualan itu merujuk pertamanya, kepada jumlah keuntungan perniagaan Britama dan Prime Co dan keduanya, kepada jumlah nilai aset Britama dan Prime Co dan semua subsidiari mereka.

Syarikat plaintif kemudiannya telah membawa suatu tindakan untuk mendapatkan kekurangan wang yang berkaitan dengan keuntungan perniagaan dan nilai aset itu. Selepas writ itu difailkan, percubaan telah dibuat oleh defendan ketujuh dan sebuah subsidiari plaintif untuk menyelesaikan perkara itu dan pada tahun 1990, sepucuk surat telah dihantar oleh defendan ketujuh kepada subsidiari plaintif mengesahkan penyelesaian itu. Surat itu merujuk kepada supucuk surat yang telah dihantar oleh plaintif kepada defendan ketujuh dalam tahun 1989, yang mengandungi syor-syor untuk penyelesaian.

Penyelesaian yang ditawarkan oleh surat 1990 itu telah diterima dan dilaksanakan dengan sejumlah wang yang diterima oleh plaintif. Selepas wang itu dibayar, empat daripada defendan telah memohon melalui saman, dengan bergantung kepada penyelesaian itu, untuk membatalkan pernyataan tuntutan syarikat plaintif. Syarikat plaintif telah membuat bantahan atas permohonan itu dan bergantung kepada surat 1989 itu dengan menyatakan bahawa penyelesaian 1990 itu tidak boleh berkesan untuk melepaskan keempat-empat defendan daripada tuntutan plaintif di dalam guaman sivil itu.

Permohonan defendan itu berjaya di hadapan pendaftar tetapi keputusan itu telah diakaskan oleh hakim yang arif di Mahkamah Tinggi. Defendan telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Tugas tunggal mahkamah adalah supaya mentafsirkan dokumen-dokumen untuk mendapatkan niat pihak-pihak itu. Tugas itu sebenarnya adalah untuk mencari makna perkataan-perkataan yang digunakan kerana makna itu adalah sama dengan niat pihak-pihak itu untuk maksud tafsiran. Perkataan-perkataan di dalam surat 1990 itu mengenai penarikan balik guaman sivil yang berkenaan sepatutnya diberi erti yang jelas dimaksudkan kecuali jika terdapat sebab-sebab yang kukuh untuk mengendahkannya.

(2) Surat 1990 itu telah menawarkan penyelesaian kepada kesemua defendan (termasuk perayu sekarang ini) dan bukan hanya kepada defendan ketujuh, di dalam guaman sivil yang dikehendaki ditarikbalik. Makna perkataan-perkataan itu adalah pelepasan kesemua defendan di dalam guaman sivil itu dan bukan hanya defendan ketujuh atau mana-mana defendan tertentu. Oleh itu, s 45 Akta Kontrak 1950 tidak boleh digunakan untuk berhujah bahawa pelepasan seorang penjanji bersesama tidak membebaskan mana-mana penjanji bersesama yang lain.

(3) Mahkamah Tinggi selalu mempunyai bidangkuasa yang sedia ada untuk mencegah penyalahgunaan prosesnya tidak kira sama ada ia dipohon dengan nyata atau tidak di dalam suatu permohonan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980, kecuali jika permohonan itu dihadkan semata-mata atas alasan bahawa sesuatu pliding tidak menzahirkan kausa tindakan atau pembelaan yang munasabah, mengikut mana yang berkenaan.]

Notes

For a case on the court's inherent jurisdiction to strike out pleadings, see 2 *Mallal's Digest* (4th Ed) para 1818.

Cases referred to

1 *Shore v Wilson* [1942] AC & F 355 HL (refd)
2 *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (folld)
3 *Pinnel's case* [1602] 5 Co Rep 117a (refd)

Appeal from: Civil Suit No D3–23–2194 of 1987 (High Court, Kuala Lumpur)

G Sri Ram (*Rosli Dahlan* with him) (*Allen & Gledhill*) for the appellants.
John Mathew (*Karen Kaur* with him) (*Shook Lin & Bok*) for the respondent.

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): Two letters figure prominently in this appeal with facts of the case practically undisputed. It will only be necessary to set out such of the facts as found necessary for elucidating the points in issue.

The appellants, together with four other parties, were cited as defendants in the civil suit concerned herein, brought by the respondent who was the plaintiff below. (Such defendants are hereinafter called the defendants collectively; the appellants or the appellants/defendants, whenever the context requires the distinction; and the respondent, the plaintiff/company).

The defendants were beneficial owners of shares in a company called Britama Properties Sdn Bhd (hereinafter called 'Britama'). Britama is a holding company of two wholly-owned subsidiaries, one of which is called Prime International (Holdings) Pte Ltd (hereinafter called 'Prime Co').

The defendants sold their respective shares or shareholdings in Britama to the plaintiff/company by an agreement dated 15 February 1985 (hereinafter called 'the sale agreement') in consideration of allotment to the defendants, shares in the plaintiff/company credited as fully paid up. Under the sale agreement, the defendants undertook, jointly and severally, to pay the plaintiff/company, sums of money by which, certain specified sums of money set out in the sale agreement and represented to the plaintiff/company by the defendants as correct, were less. These specified sums first referred to the amount of the combined operating profit of Britama and Prime Co, and secondly to the amount of the total value of the assets of Britama and Prime Co and all their subsidiaries.

In addition to the sums undertaken to be paid as computed above, the defendants undertook also, jointly and severally, that the unaudited balance sheets of Britama made up to 31 December 1984, gave a fair view of the financial position of Britama.

All the above undisputed facts were set out in the relevant amended statement of claim dated 5 September 1987 by which it was further alleged that a sum of S$3,298,244.83 owed by the seventh defendant (viz Associated Management Services Pte Ltd) to Britama was wrongly stated as part of the deposits of Britama with 'bankers and other institutions'.

The amended statement of claim claimed:

(a) RM92,961 being the emerging shortfall in regard to the aforesaid combined operating profit, damages for breach of warranty or alternatively interest; and

(b) RM78,214 being the emerging shortfall in regard to the aforesaid value of total assets, damages for breach or alternatively interest and the said sum of S$3,298,244.83, the sum which was said to have been wrongly described in the aforesaid balance sheets.

After the writ herein was filed, firm though intermittent negotiations were under way between the seventh defendant and British American Investment Pte Ltd, a subsidiary of the plaintiff/company which was allowed by the plaintiff/company to negotiate on its behalf with the seventh defendant with regard to the claim of the plaintiff/company in the civil suit concerned herein. Nothing of substance really turns on the right of this subsidiary to so negotiate on behalf of the plaintiff/company, (this company is hereinafter called 'British American IPL'). On 4 April 1990, the seventh defendant wrote to British American IPL regarding the settlement in connection with the civil suit concerned herein (hereinafter called 'the 1990 letter') which is the crux of the appeal and which is set out below:

> Associated Management Services Pte Ltd
> c/o No 1 Sixth Lok Yang Road, Singapore 2262
>
> 4 April 1990
>
> Mr Steve SV Wong
> British American Investment Pte Ltd
> 57 Robinson Road
> 6th Storey
> British American Insurance Building
> Singapore 0106
>
> Dear Sir
>
> We write to offer you, pursuant to the charge dated 7 July 1989, the sum of S$3,800,000 (this is inclusive of the RM1,500,000 due to British-American Life and General Assurance Bhd and/or its subsidiaries and associates and S$150,000 representing lump sum payment of interest accruing) as full and final settlement.
>
> In consideration of this payment you will undertake to release the six million Pacific Can Investment Holdings Ltd shares to us.
>
> Pursuant to this settlement you will undertake as a condition precedent to cause British-American Life and General Insurance Bhd to withdraw all legal action against the writer, the first, second and eighth defendants and withdraw the Kuala Lumpur High Court Suit No D3–23–2194–87 as stated in their letter of 1 April 1989.
>
> If you are in agreement to this letter, please sign and return to us a copy together with your receipt in acknowledgment.
>
> Yours truly
> —Sgd—
> EKH Goh
> Director
>
> We, British American Investments Pte Ltd, confirm our acceptance of the offer and conditions as stated above.
>
> Pang HN Long
> For and on behalf of British American Investments Pte Ltd

The 1990 letter mentions another letter dated April 1989 sent by the plaintiff/company to the seventh defendant with a copy thereof to British American IPL by which the plaintiff/company has set great store. This letter (hereinafter called 'the 1988 letter') is set out below:

British-American Life & General Insurance Bhd

1 April 1989

Associated Management Services (Pte) Ltd
c/o 1 Sixth Lok Yang Road
Singapore 2262

Dear Sirs

Re: Kuala Lumpur High Court Suit No D3-23-2194-87

We refer to the above suit wherein you are the seventh defendant.

We are pleased to accept your offer to settle our claims against yourselves as follows:

1 (a) payment of S$520,603 to British American Investments Pte Ltd in settlement of our claim under paragraph 10(b) of the amended statement of claim; and

(b) payment of RM1,500,000 to ourselves in settlement of our claims in respect of all the other prayers of the amended statement of claim.

2 In consideration of the above payments and on receipt of the same, we shall cause the above action against yourselves and the first, second and eighth defendants to be discontinued.

3 The payments referred to hereinabove are to be made within one hundred and eighty (180) days from the date hereof failing which we are at liberty to continue all legal proceedings against yourselves and the first, second and eighth defendants.

4 This settlement should not be construed or operate as a release of any cause of action of the third, fourth, fifth and sixth defendants ('them') or any of them nor shall it be construed or operate as a release of any claim or claims we have or may have against them and it shall not prejudice or affect our rights to proceed with our claims against them.

Yours faithfully
—Sgd—
Shahridan Mohd Sa'aid
Company Secretary
cc: British American Investments Pte Ltd

It is pertinent to observe that the offer or counter-offer by the plaintiff/company to settle on the plaintiff/company's terms lapsed after the said 180 days with no forthcoming acceptance from the seventh defendant. The settlement offered by the seventh defendant by the 1990 letter and accepted by the British American IPL was carried out with the sum duly received.

After the sum was paid, the appellants (four of the defendants), applied by summons before the learned registrar under O 18 r 19 of the Rules of the High Court 1980, relying on the settlement, for striking out the plaintiff/company's amended statement of claim on the grounds that the statement of claim was scandalous, frivolous and vexatious or it might prejudice, embarrass and delay the fair trial of the action.

The supporting affidavit of the appellants there relied heavily on the 1990 letter and averred, to the effect, that the plaintiff/company's action could no longer be maintained.

The opposing affidavit of the plaintiff/company on the other hand, relied principally on the 1989 letter and that by the 1989 letter, the 1990 settlement could not operate as a release of the appellants from the plaintiff/company's claim in the civil suit concerned herein.

The application of the appellants succeeded before the learned registrar whose decision was reversed by the learned judge in the court below and the appeal now before us is an appeal from the learned judge's decision.

The two letters thus fall to be considered. It is well known that the terms of a contract may be contained in more than one document, thus for example, one of two documents may expressly or by necessary implication refer to another document as being subject to the said other document, thereby causing the terms of the other document to be incorporated by reference into the first-mentioned document. Such effect, if it is to be given initially to any document, will initially depend on the construction itself of a document such as the first-mentioned document.

We now consider whether the terms of the 1989 letter ought to be deemed to be incorporated into the 1990 letter by reference by first looking at the 1990 letter. It was written almost one year after the letter of 1989. Only the third paragraph of this letter of 1990 contains the reference to the letter of 1989 and in these words:

> Pursuant to this settlement you will undertake as a condition precedent to cause British-American Life and General Insurance Bhd to withdraw all legal action against the writer, the first, second and eighth defendants and withdraw the Kuala Lumpur High Court Suit No D3–23–2194–87 as stated in their letter of 1 April 1989.

Looking more closely, the letter of 1990 does not have a heading containing the identifying numbers of the civil suit concerned herein so that its absence would have rendered it necessary for the writer of the letter of 1990, when offering a settlement, to express the particulars of the civil suit concerned herein in the body of the letter so that the addressee would be reminded of the nature of the claim of the plaintiff/company in the civil suit concerned herein, and above all, to relate the settlement to the said civil suit.

It is further observed that at the foot of the letter of 1990, the addressee signed in confirmation of 'our acceptance of the offer and conditions as stated above' without any qualification.

As part of the settlement, the plaintiff/company agreed in effect in the letter of 1990 to 'withdraw the Kuala Lumpur High Court Civil Suit No D3–23–2194–87 as stated in their letter of 1 April 1989'. The words 'as stated in their letter of 1 April 1989', were relied on by the plaintiff/company and we will comment on them later on.

It is to be borne in mind that it is the sole function of the court to construe a document with a view to finding the intention of the parties. The function is in reality to find the meaning of the words, for such meaning is equivalent to such intention of the parties for the purpose of interpretation. Please see a similar observation in *Shore v Wilson*.[1]

The words about withdrawing the civil suit concerned herein in para 3 aforesaid, unless there is strong reason to disregard them totally, would have to be accorded the meaning they clearly convey. Such strong reason

may be that the words are so repugnant to the rest of the letter of 1990, that they ought to be totally disregarded by applying the golden rule of construction. The words, '... as stated in their letter of 1 April 1989' are more probably than not, mere words that as a matter of grammar, qualify the identifying numbers of the civil suit concerned herein and cannot be construed as having the effect of incorporating the terms of the letter of 1989 except by an unjustifiable stretch of imagination. It is to be borne in mind that should the seventh defendant ask for less than the withdrawal of the whole civil suit concerned herein, namely ask for withdrawal of legal action against itself and its friends, viz the other defendants, then the appellants could ask the seventh defendant and its friends to contribute to any further sums proportionally which the plaintiff/company might succeed in recovering against the appellants.

The inference from para 3 of the letter of 1990 is therefore that the seventh defendant through its director, the second defendant, offered a settlement for all the defendants (including the present appellants) and not just itself, in the civil suit which was required by the seventh defendant to be withdrawn. We are of the view that the meaning of the words is a release of *all* the defendants in the civil suit concerned herein, and not just the seventh defendant and/or any other particular defendants. The action is therefore bound to fail. We therefore have reached a decision on the merits.

This decision also puts paid to the submission of the respondent based on s 45 of the Contracts Act 1950 which provides that a release of a joint promisor does not discharge any other joint promisor. Here, the settlement is a release of all joint promisors.

However, the learned judge in the court below, who is very experienced and very able, and who referred very much to the same issues, appears to be much exercised by the fact that the application was made under O 18 r 19, in reversing the learned registrar's decision, in holding, 'On the facts of this case I consider that O 18 r 19 is not appropriate to shut out the plaintiffs from pursuing their claims'.

The cautionary words are words which have been frequently employed in connection with an application under O 14. It was unfortunate that the case of *Tractors Malaysia Bhd v Tio Chee Hing*,[2] a Privy Council case was not cited in the court below, though it was cited to us here.

In *Tractors*,[2] the defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine-toothed comb and decided to agree with the learned judge at the first instance and restored the High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19

unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

In passing, we would like to say that we are not unmindful of the interesting arguments on certain legal points which were however only advanced by learned counsel for the appellants, made necessary no doubt by the then possibility that this court might hold that the letter of 1990 ought to be read as being subject to the letter of 1989. The said legal points were the common law rule in *Pinnel's case*,[3] s 65 of the Contracts Act 1950, etc but they are not necessary for the court in reaching its decision. It would not be appropriate to deal with them here and now and they have to be put away for another day.

In conclusion, with great respect, the learned judge could have avoided the pitfall as described by the Privy Council in *Tractors*.[2] The lower court should have also scrutinized the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to send the case back to its starting point to start its long and expensive course albeit such a conclusion was reached on an application filed under O 18 r 19.

We must emphasize that for any court to reach such a similar decision on an application under O 18 r 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

We therefore allow the appeal herein by restoring the decision of the learned registrar in question in striking out the amended statement of claim and also dismissing the claims of the plaintiff/company in the civil suit concerned herein. The respondent will have to pay costs here and below.

Appeal allowed.

Reported by Prof Ahmad Ibrahim